Docket No. 89-1784

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

THE INSURANCE COMPANY OF THE STATE OF PENNSYLVANIA and KERWICK & CURRAN, INC.,

Petitioners,

vs.

BEN COOPER, INC.,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

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COUNTER-STATEMENT OF QUESTIONS PRESENTED

I. Whether a bankruptcy court has core jurisdiction, pursuant to 28 U.S.C. § 157(b)(2)(A), over state law claims where the contract was entered into knowingly with a debtor under the jurisdiction of the bankruptcy court.

II. Whether a bankruptcy court may conduct a jury trial in core proceedings.

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RULE 29.1 STATEMENT

Respondent has no parent companies nor any subsidiaries which are not wholly-owned subsidiaries.

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RESPONDENT'S BRIEF IN OPPOSITION

The petition does not present any issues which are appropriate for review by this Court. The Court of Appeals for the Second Circuit, in its opinion below,[1] correctly held that the adversary proceeding commenced by respondent was a core proceeding and that the core proceeding should be referred to the bankruptcy court for a jury trial. The arguments cited in the petition are insufficient to require review.

[1] The decision of the Court below is reported at 896 F.2d 1394 (2d Cir. 1990), and is reprinted in the appendix to the petition at A-1. All references thereto will be to the appropriate pages in the appendix.

COUNTER-STATEMENT OF THE CASE

Pursuant to Rule 15.1, respondent respectfully points out the following misstatements and omissions in the petition.

Facts

Most importantly, the petition fails to make reference to the fact that respondent's plan of reorganization contained an express requirement that it maintain adequate insurance coverage. As the Second Circuit noted:

> Cooper submitted a reorganization plan under which, among other things, it covenanted to "keep all of its respective properties adequately insured at all times with responsible insurance carriers against loss or damage by fire and other hazards." [A-4]

This fact underlies the Second Circuit's holding that the adversary proceeding is core and is essential to consideration of the petition.

In addition, it should be noted that respondent is not merely a "costume importer/manufacturer" but is a manufacturer and importer of toys as well (A-4).

Furthermore, the petition (p.4) characterizes the fire which gave rise to the insurance claim underlying this dispute as a "small" fire. The magnitude of the fire is a fact in dispute between the parties.

Statutes

In addition to the statutes referenced in the petition, the following statutes are also involved in this appeal: 28 U.S.C. § 151; Bankruptcy Code Sec. 301 (11 U.S.C. § 301); and Bankruptcy Code Sec. 541(a)(11 U.S.C. § 541). Copies of the foregoing statutes are contained in an appendix hereto, beginning at page A-35.[3]

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[3] The petition includes an appendix containing pages A-1 through A-34.

REASONS FOR DENYING THE WRIT

POINT I

THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY HELD THAT A BANKRUPTCY COURT HAS CORE JURISDICTION, PURSUANT TO 28 U.S.C. § 157(b)(2)(A), OVER STATE LAW CLAIMS WHERE THE CONTRACT WAS ENTERED INTO POST-PETITION

After reviewing this Court's decision in *Northern Pipeline Construction Co. v. Marathon Pipe Line Co.*, 458 U.S. 50 (1982), as well as the statutory framework contained in the Bankruptcy Amendments and Federal Judgeship Act of 1984 ("BAFJA"), which was Congress' response to *Marathon*, the Second Circuit held that the bankruptcy court has core jurisdiction, pursuant to 28 U.S.C. § 157(b)(2)(A), over contract claims under state law when the contract was entered into post-petition (A-12). This holding is well supported by the applicable statutes and case law and is not in need of review by this Court.

In its review, the Second Circuit focused on subsection A of 28 U.S.C. § 157(b)(2) – "matters concerning administration of the estate" (A-7).[3] As to such matters which fall within the "core" jurisdiction of the bankruptcy court, a bankruptcy judge "may hear *and* determine" such proceedings. 28 U.S.C. § 157(b)(1) (emphasis added).

In finding the subject adversary proceeding to be a "core" proceeding within the meaning of 28 U.S.C. § 157, the Second Circuit recognized the crucial difference between a dispute arising before the filing of the bankruptcy petition and a dispute arising after the filing of the petition. With the commencement

[3] The petition (p.10) incorrectly notes that the Second Circuit's decision did not involve any enumerated section of § 157(b)(2).

of the bankruptcy case, the filer becomes a "debtor" and the debtor's assets become the "estate". 11 U.S.C. § 301; 11 U.S.C. § 541(a). The "line of cleavage" is thus drawn, *see Goggin v. Division of Labor Law Enforcement*, 336 U.S. 118, 125 (1949), and, as the Second Circuit acknowledged, post-petition activities must be analyzed differently from pre-petition activities (A-11).

In the case at bar, the Second Circuit noted that the facility at which the fire took place was an asset of the estate; the debtor's plan of reorganization expressly required that the debtor maintain adequate insurance; the confirmation of the plan was premised on the maintenance of adequate insurance; and the appellees (petitioners) were fully aware that they were dealing with a debtor (A-12). Under these circumstances, the Court below found that "(i)t is difficult to conceive of a claim, at least one arising outside of the substantive law of bankruptcy, that would be more intrinsic to estate administration." (A-12). *Cf. Arnold Print Works, Inc. v. Apkin (In re Arnold Print Works, Inc.)*, 815 F.2d 165 (1st Cir. 1987); *Burns v. Massachusetts Property Ins. Underwriting Assoc. (In re Mike Burns Inn, Inc.)*, 70 Bankr. 863 (Bankr. D. Mass. 1987); *L.A. Clarke and Son, Inc. v. Bullock Construction, Inc. (In re L.A. Clarke and Son, Inc.)*, 51 Bankr. 31, 33 (Bankr. D.C. 1985) ("All the operative events . . . occurred during the period after the Debtor's Chapter 11 petition was filed, while the Debtor was a Debtor-in-possession, and they all involved the activities of the Debtor as Debtor-in-possession operating under the aegis of this Court's protection and authority.").

Contrary to petitioners' argument, there is nothing arbitrary about the test applied by the Second Circuit. A debtor-in-possession is an entity created by the bankruptcy laws. It is hardly arbitrary to hold that those who *knowingly* contract with a debtor-in-possession be held accountable before the court charged with protecting the debtor. Indeed, this is the only holding consistent with the statutory scheme.

The Second Circuit's holding is also entirely consistent with this Court's decision in *Marathon*. The Court in *Marathon*

held that Congress could grant bankruptcy courts the right to issue final orders in actions that were at the "core of the federal bankruptcy power", but not in those actions which involved merely "state-created private rights". *Id.*, 458 U.S. at 71. The dispute in *Marathon* arose pre-petition; thus, the holding in *Marathon* is entirely consistent with the holding of the Court below.[4] *See, e.g., In re Arnold Print Works, Inc., supra*, 815 F.2d at 165-166 ("In our view, the matter of timing and the relation to judicial administration of the bankrupt's estate make a critical constitutional difference between *Marathon* and the present case."); *In re Mike Burns Inn, Inc., supra*, 70 Bankr. at 867 ("the instant case is distinguishable from *Marathon* because the Debtors are suing . . . for post-petition breach of contract and deceit, matters clearly affecting this Court's administration of the Debtors' estates").

A pre-petition cause of action fits more readily within the Court's description of "private" rights. However, once the "line of cleavage" is crossed, i.e., once the bankruptcy petition is filed, post-petition contracts fit squarely within the core of the Federal bankruptcy power which, in this case, concerns the administration of the estate.[5]

The other circuit-level cases relied upon in the petition are also readily distinguishable and do not reflect a true disagreement among the circuits. As the Court below noted, the Ninth Circuit's decision in *Piombo Corp. v. Castlerock Properties, Inc. (In re Castlerock Properties)*, 781 F.2d 159 (9th Cir. 1986) was arguably based on a pre-petition contract (A-13); in addition, the sweeping pronouncement contained therein would emasculate the list of core proceedings contained in 28 U.S.C. § 157(b)(2).[6] As such, it must be discounted.

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[4] Of course, this was how the Second Circuit distinguished *Acolyte Electric Corp. v. City of New York*, 69 Bankr. 155 (Bankr. E.D.N.Y. 1986), *aff'd*, 1987 WL 47763 (E.D.N.Y. 1987), a case relied upon by appellees below and in their petition.

[5] Contrary to petitioner's statement (p.10), the Second Circuit did in fact consider the state law nature of the underlying dispute (A-10). Clearly, the fact that the adversary proceeding involves issues of state law is not determinative. *See* 28 U.S.C. § 157(b)(3).

Similarly, *Wood v. Wood (In re Wood)*, 825 F.2d 90 (5th Cir. 1987) relies on a far narrower reading of § 157 than is indicated by the legislative history of BAFJA; to the extent that *Wood* conflicts with the holding of the Court below, it should also be discounted. Contrary to petitioners' argument (p.12), the nature of the underlying dispute cannot be considered in a vacuum; the effect of the dispute on administration of the estate must also be considered. In addition, although not specifically addressed by the Second Circuit, it could be argued that the Second Circuit's finding is consistent with *Wood*, since, as a post-petition claim, this proceeding could not have arisen *except* in the context of a bankruptcy case.

In holding that a post-petition contract is an essential part of estate administration, the Court below was merely acknowledging the intent of Congress in enacting BAFJA – to ensure that proceedings "core" to the bankruptcy be determined by the bankruptcy court. This holding should not be disturbed.

• The Ninth Circuit would, in effect, re-write the statute to eliminate subsections A (administration of the estate) and O (the "catch-all" provision).

POINT II

THE COURT OF APPEALS FOR THE SECOND CIRCUIT CORRECTLY RULED THAT A BANKRUPTCY COURT MAY CONDUCT A JURY TRIAL IN CORE PROCEEDINGS

In ruling that a bankruptcy court may hold a jury trial in a core proceeding, the Court below decided the issue that had been hinted at but left open by this Court in *Granfinanciera, S.A. v. Nordberg*, ___ U.S. ___, 109 S.Ct. 2782 (1989). In so doing, the Second Circuit did the only thing it could do under the circumstances – finding no statutory or constitutional prohibition, the Court below came to the only conclusion consistent with the statutory scheme. Its decision need not be reviewed.

In *Granfinanciera*, the Court held that Congress could not eliminate a party's Seventh Amendment right to a jury trial. *Id.*, 109 S.Ct. at 2800. However, the Court found it unnecessary to explicitly rule on the jury trial issue. *Id.*, 109 S.Ct. at 2802. There is no reason to believe, however, that if this Court had so ruled, it would have done so any differently than the Second Circuit.

Since *Granfinanciera* did not foreclose the possibility of jury trials in bankruptcy court (and, indeed, can be read, at least to some extent, to favor that possibility, *see*, *Id.*, 109 S.Ct. at 2801), the Court below examined the statutory and constitutional authority (or lack thereof) for jury trials in bankruptcy court.

Finding little guidance in the only statute which explicitly addresses jury trials (28 U.S.C. § 1411), the Court turned to the sections granting jurisdiction to the bankruptcy court. Section 151 gives bankruptcy judges "the authority conferred under this chapter with respect to any action suit, or proceeding." 28 U.S.C. § 151. Section 157(b) gives bankruptcy judges the authority to conduct trials and issue final orders in core proceedings. 28 U.S.C. § 157(b). The Second Circuit

believed that the only way to reconcile these concerns, consistent with *Granfinanciera*, was to permit the bankruptcy court to conduct jury trials (A-19).

Next, the Court below turned to the Constitution. The Court found no impediment in the Seventh Amendment, at least as to core proceedings, since the statutory provisions do not require *de novo* review of determinations in core proceedings (A-21). *See* 28 U.S.C. § 157(b)(1). Contrary to petitioners' statement (p.15), the Court below never acknowledged a Seventh Amendment problem with respect to *core* proceedings, but only with respect to *non-core* proceedings (A-20).

As for Article III, the Second Circuit reasoned that since bankruptcy courts have the constitutional power to enter final judgments without violating Article III, jury verdicts likewise would not be violative of Article III (A-21-22).[7]

The recent decision of the United States Court of Appeals for the Eighth Circuit, *In re United Missouri Bank of Kansas City, N.A.*, __ F.2d __, 1990 WL 48555 (8th Cir. 1990), which disagreed with the decision reached in the Court below, does not provide sufficient reason for review.[8] The Eighth Circuit took an extremely narrow view of the 1984 amendments, ignoring Congress' intent to broaden bankruptcy court jurisdiction to its constitutional limits.[9] *See, e.g., In re Arnold Print Works, Inc., supra*, 815 F.2d at 168 ("the legislative history of the new statute indicates that Congress intended that 'core proceedings' would be interpreted broadly, close to or congruent with constitutional limits.").

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[7] In addition, the Court below noted (A-22) that Article I judges have been granted the power to conduct jury trials in other contexts. *See Pernell v. Southall Realty*, 416 U.S. 363 (1974); *Collins v. Foreman*, 729 F.2d 108 (2d Cir.), *cert. denied*, 469 U.S. 870 (1984).

[8] Indeed, though disagreement among the Circuits is one reason the Court will consider in ruling on a petition for certiorari, such factor is "neither controlling nor fully measure[s] the Court's discretion." Rule 10.1.

[9] Indeed, the Eighth Circuit did not even consider the constitutional issues, but instead based its decision on its narrow view of the statutory scheme. *Id.*, 1990 WL 48555, n. at 6.

In addition, the Eighth Circuit failed to recognize what is, in fact, the crux of the Second Circuit's decision on the jury trial issue – the only way to reconcile this Court's holding in *Granfinanciera* with Congress' language expressed in 28 U.S.C. § § 151 and 157 is to find, as the Second Circuit did, that Congress at least implicitly intended that jury trials be conducted in the bankruptcy courts. There is every reason to believe that if this issue were properly before the Court in *Granfinanciera*, the Court would have reached the same conclusion as the Second Circuit. *See*, *Id.*, 109 S.Ct. at 2801.[10]

Therefore, no further elaboration is necessary and the jury trial issue need not be reviewed.

[10] As noted by the Court below, the majority of courts which have addressed the issue have found that bankruptcy courts may conduct jury trials (A-19).

CONCLUSION

For the foregoing reasons, the petition should be denied.

Dated: June 6, 1990

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